



## **A-76: Twelve Areas of Concern**

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Alfred E. Moreau  
Attorney-Advisor  
HQDA, OTJAG  
Contract Law Division  
(703) 588-6754/DSN 425



## A-76: Training Objectives



- **Objective #1:**
  - Be aware of common problems which have occurred in past competitions
- **Objective #2:**
  - Learn how to avoid these situations



## Top 12 Principles to a Successful

### • Principles A-76 Competition

1. Don't just "take care of our people."
2. Remember, A-76 is not simple.
3. Establish and observe required firewalls.
4. Develop a complete and fair Performance Work Statement (PWS).
5. Insure costing principles are applied fairly.
6. Construct a complete Agency Tender which complies with the PWS.



## Principles 7-12



7. Prepare a Letter of Obligation for the MEO
8. Understand the rules for contests/protests
9. Non-appropriated Fund Instrumentalities (NAFIs) are different
10. Direct conversions are bad, probably
11. 2003 Revision to A-76 is a mixed bag
12. Remember that Congress is ready and willing to help with the process



# 1. Don't "Take Care of Our People"

- Government personnel who are managing the A-76 Competition must be totally objective in all stages of the competition
- This includes PWS construction and any other issues, before the issuance of the solicitation and in all preliminary stages
- These people must remember their responsibility is to complete a legally supportable competition, not save MEO jobs



## 2. A-76 is Not Simple



- The devil is in the definitions, not the details, *e.g.*
  - “MEO Subcontract”
  - “Civilian employee” vs. “Government Personnel”
- A-76 is not just a procurement process, it also involves labor and, especially, political issues
- There is little black letter law- regulations or statute



## 3. Establish and Observe Required Firewalls



- GAO protest decisions in two Jones/Hill cases required the Government to comply with Section 9.5 of the FAR on Conflicts of Interest
- This requires the Government to totally separate the people who draft the PWS from those people who write the management plan and cost estimate
- Applies to attorneys advising the teams as well



# Firewalls - Requirements



- Strict independence required
  - No common members (or advisors) of teams
  - No exceptions
    - Unlike FAR 9.503, no provision for waivers



# Firewalls - Legal Representation



- ATO/MEO team - independent counsel, through, at least, the contest phase
- CO/SSA team (acquisition) - independent counsel
- HRA/employee agents - Not clear, if independent counsel needed - not likely
- Degree of independence/firewalls not ascertained - still under discussion



## 4. Develop a Complete and Fair Performance Work Statement (PWS)

- Major Points:
  - PWS must be complete - all work is listed
  - ATO & offerors must totally account for who is to do the work in the PWS
  - PWS is applied equally to the Agency Tender (the Government)



# PWS-General Assumptions



- PWS is “performance based”
- Adequate and timely work load data exists to reasonably verify the requirements
- Work is classified correctly, *e.g.*

Davis-Bacon Act (construction)

Service Contract Act (“primarily for services”)

Some contracts will have both



# GAO PWS-Related Protest Decisions



- Agency (no longer the IRO) must make a reasonable determination that all private sector offerors and the Agency meet the PWS requirements
- The Agency must indicate how each tasking in the PWS will be performed
- Staffing levels may be questioned by source selection officials



## 5. Insure Costing Principles are Applied Fairly

- Some items to double check:
  - Are all costs accounted for?
    - Less than full-time “overhead” positions- *i.e.* personnel
  - Are required Wage Determinations (SCA & DBA) current and included?
  - Are common omissions, *e.g.*- Contract administration, Federal Tax Adjustment, conversion differential included?



# Costing - General Assumptions



- See Attachment C, 2003 Revised A-76 - “Calculating Public-Private Competition Costs”
- Use the COMPARE software - necessary computations are already there
- In the interest of “leveling the playing field”, some arbitrary decisions were made, *e.g.*
  - Escalation policies
  - Conversion differential
  - Federal taxes



## Include These Costs :

## Non-Agency Tender Performance



- Contract price (private or public cost estimate (Line 7, SCF/SLCF))
- Tax-Exempt Organization, if applicable (Compare with taxable entities without using tax adjustment)
- Performance Bond, if any
- Contract Administration costs (use chart on C-23)
- Additional Costs
- One-time conversion costs
- Gain on Assets
- Federal Tax Adjustment (Based on revenue generated by private offeror) (Based on Tax Rate Table)
- Total Cost (Line 13)



## **6. Construct a Complete Agency Tender, Which Complies with the PWS**

- Definition of “Agency Tender” (2003 Version of A-76, page D-2):
  - “The agency management plan submitted in response to a solicitation for a standard competition. The agency tender includes an MEO, MEO quality control plan, MEO phase-in, and copies of any MEO subcontracts (with the private sector providers’ proprietary information redacted). The agency tender is prepared in accordance with Attachment B and the solicitation requirements.”



## MEO Subcontracts/MEO Partnering



- A-76 Definition of “MEO subcontracts”:
  - “Contracts between an agency and the private sector that are included in the Agency Tender”
- Applicability of FAR is not settled
- Probably out to be called “MEO Partnering or Teaming,” since this document isn’t a subcontract
- Rules in 2003 Circular
  - Can only be done if it doesn’t result in the direct conversion of work performed by government employees



# Avoiding Successful GAO Protests on the Agency Tender



- Agency Tender must include all costs of performance
- Agency Tender must clearly demonstrate how it complies with PWS
- Agency Tender must specifically account for all the work in the PWS



## 7. Prepare a Letter of Obligation (LOO)

### for the MEO

Complete Definition (2003 Revision to A-76, Page D-6):

- A formal agreement that an agency implements when a standard or streamlined competition results in agency performance (*e.g. MEO*)

Numerous issues remain-

- PCO's role in issues dealing with: performance, funding, modifications to the LOO, and/or PWS, personnel issues etc.

Use of Award Fees

- Unclear how the MEO can participate in award fee. Suggestion: use performance awards.
- If MEO can't participate in award fees, can we include award fees in the competition?



## 8. Understand the Rules for Contests/Protests

- Issues -
  - Contests
  - Protests to General Accountability Office (GAO) under the Competition in Contracting Act
  - Who may “contest”?
  - Who may protest to GAO?



## Contests



- Replaced Administrative Appeal Process
- Based on FAR Agency Protest Procedures (FAR 33.103), which are not mandatory
- Directly Interested Parties may contest the following: solicitation, cancellation, exclusion, the performance decision or termination or cancellation if the allegation is made that the termination or cancellation is based on improprieties concerning the performance decision



## Protests to the GAO



- GAO will accept protests once the process has progressed into the procurement phase (once the solicitation has been issued)
- After the solicitation has been issued, normal GAO protest rules will apply
- GAO has required exhaustion of administrative remedies under previous versions of A-76



# Who May “Contest”?



- “Directly Interested” Parties may contest
- Definition of “Directly Interested Party”- (2003 A-76, Page D-4 and 25 March 2005 OMB Letter):
  - “The agency tender official who submitted the agency tender; a single individual (one of the directly affected employees) appointed by a majority of directly affected employees as their agent; a private sector offeror; or the official who certifies the public reimbursable tender.”



# Who May Protest to GAO?



- Unsuccessful “offerors”- limited by Competition in Contracting Act (CICA) to private offerors until passage of P.L. 108-375- the FY05 DOD Authorization Act
- P.L. 108-375, Section 326, amended CICA to allow the ATO to protest to GAO on his own or at the request of a majority of the employees, unless the ATO determines there is no “reasonable basis” for the protest



# 9. Non-appropriated Funds Instrumentalities (NAFs) are Different



- Subject to the Inventory Requirements of the Circular - Attachment A of 2003 A-76
- Not clear if the competition requirements of Attachment B of 2003 A-76 applies
- Army generally does not compete these functions



# Unique NAF Problem - A-76



- NAFs have statutory authority to accept voluntary (FREE) labor in a number of areas
- The Department of Labor has opined that the authority does not extend to contractors, who remain obligated to pay the minimum wage of the Service Contract Act



# 10. Direct Conversions are Bad, Probably



- 2003 Circular mandates streamlined or standard competitions for all performance determinations of Government functions, regardless of size
- While some statutory preference programs (JWOD, RSA, native Hawaiian corporations etc.) are arguably applicable, DOD policy is to perform competitions. No direct conversions.



## 11. 2003 Revision is a Mixed Bag



- 2003 Circular improves some things:
  - Simultaneous evaluation of Agency Tender and all private offers
  - No more "balancing" of Agency Tender if private sector offers "higher" performance level
  - No Independent Review Official (IRO)
- 2003 Circular does not improve (in my view):
  - Direct conversions
  - Confusing terms and procedures (several categories of "personnel, several minimally different definitions of "parties" etc.)



# 12. Congress is Always Ready to “Help”



- A major reason for confusing procedures and continuous revisions of agency guidance
- Past examples:
  - Adjustments for Private Sector health coverage (DOD only)
  - Limits on Streamlined competitions (DOD only)
  - Change in limits on length of studies
  - GAO jurisdiction given to ATO